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No. 990

In the

Supreme Court of the United States

OCTOBER TERM, 1970

FIRST NATIONAL BANK OF CHICAGO, as Guardian of the Estates of AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors; AMAL FAKHRI, AHMED FAKHRI, SEMIRAMIS FAKHRI, OMAR FAKHRI and AZA FAKHRI, Minors, by FIRST NATIONAL BANK OF CHICAGO, as Guardian of Their Estates,

Petitioners,

vs.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondent.

MOTION AND BRIEF IN SUPPORT OF MOTION TO STRIKE RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Now come the Petitioners and respectfully move the Court as follows:

I.

1. To strike that portion of the brief of The Fidelity and Casualty Company of New York at page 4 which asserts that the provisions of the policies of The Fidelity

and Casualty Company of New York and Continental Casualty Company were not identical insofar as this case is concerned. That portion reads in part as follows:

> Initially, it should be noted that, petitioner's contention to the contrary notwithstanding, those policies were not identical. Indeed petitioner itself equivocates in its position. At page 4 of its petition it states: "Both (policies) were identical in their terms and provisions." However, at page 6, it states that "they were *essentially* identical." *The fact is that they were materially different.* In contrast to the policy issued by respondent, the policy issued by Continental did *not* limit coverage to a scheduled itinerary by requiring that the insured be traveling upon a ticket or pass covering the entire airline trip.

2. That statement is false. The policies were *not* materially different. They were *not* different at all, insofar as this case is concerned.

3. The premium was the same, the application was the same, the beneficiaries were the same, the policy was the *same* insofar as this case is concerned. As to respondent's statement that its policy was "materially different," a reading of the provisions of both policies will show that this is false:

Fidelity and Casualty Company of New York Policy (Refused to Pay)	Continental Casualty Company Policy (Agreed to Pay)
The Company will pay the benefits specified below if during the term of this policy the Insured suffers loss resulting directly and independently of all other causes from accidental bodily injury (hereinafter referred to as "such injury"), sustained under circumstances specified below during the first one-way or round trip taken by the Insured after the purchase of this policy on Aircraft Operated by a Certified Scheduled Air Carrier as defined below from the Point of Departure to the Destination, both shown above, and return if round trip ticket is obtained before departure, *provided that at the time that the insured sustains such injury he is traveling on a transportation ticket or pass covering the whole of said airline trip, issued to him for transportation on an aircraft operated by a certificated scheduled air carrier.*	"Injury" wherever used herein means bodily injury caused by an accident resulting directly and independently of all other causes in loss covered by this policy and occurring during the first flight taken by the Insured from the Point of Departure to the Destination and the return flight from the Destination to the Point of Departure, on or after the Date of Policy Purchase; *provided a ticket for each such flight has been obtained prior to the initial flight from the Point of Departure* and further provided that such injury is sustained in consequence of riding as a passenger, and not as a pilot or crew member, on a scheduled airline flight.

It is clear that the exclusionary provisions were *the same insofar as this case is concerned.*

4. The other company paid *in full.*

5. The Fidelity and Casualty Company of New York refused to pay.

6. The U.S. District Court entered *summary judgment for plaintiff.* The Court of Appeals reversed and ordered *summary judgment for defendant.* There is no question but that the policies issued by the company which paid and the respondent company were the *same* as far as the exclusionary provisions, upon which the Court of Appeals based its opinion, are concerned. There likewise is no question but that the premium would have been the the same, if Mrs. Fakhri had merely purchased the ticket from Paris to Rabat before she left O'Hare Field, Chicago, *regardless* of whether she told the insurance clerk about the change. There is no question but that the premium is the same whether a person flies from Washington to New York, or from Washington to Singapore and back. There is absolutely *no* difference in the cost of the policy. The United States Court of Appeals did *not* even mention these undisputed *facts*, but instead took away a judgment for the five children of Mrs. Fakhri, granted by the U. S. District Judge.

This case involves a form of policy issued to hundreds of millions of travelers. Purchasers do *not* get copies of these policies. The exclusionary provisions are camouflaged and consist of unpunctuated sentences of over 200 words. Is this Court going to permit the United States Court of Appeals to render a precedent which binds children and other beneficiaries of both international and domestic air travelers from recoveries upon policies, based upon such hidden, unconscionable provisions — when this Court knows from its own experience and common sense

that purchasers do not receive copies of these policies and the policies are mailed immediately to the beneficiaries — and when this Court knows that the insurance premiums are the same regardless of the number of trips involved provided they occur within the time limit of the policy? In other words, here is a case where five minor children are deprived of the recovery of insurance which their mother bought for them, even though another company, with the identical policy, paid, and the respondent company did not.

The reason we make these assertions is in order that this Court will realize the significance of the respondent's blatantly false statement that the exclusionary clauses were "materially different" — when in fact they were identical insofar as this case is concerned.

7. The statement in the brief of respondent concerning such insurance policies is false and should be stricken.

II.

1. To strike that portion of the brief of The Fidelity and Casualty Company of New York which asserts that under Illinois Law Mrs. Fakhri's five children are not entitled to the proceeds from the insurance policy.

2. Fidelity and Casualty Company of New York asserts that the Court's decision in *Thompson* v. *Fidelity & Casualty Company of New York,* 16 Ill. App. 2d 159, 148 N.E. 2d 9, cert. den. 358 U.S. 837 (1958) represents the current law of Illinois and is controlling in this case.

This is not just another civil case involving just another insurance policy.

3. The Appellate Court of Illinois, Second Circuit (the same Circuit which decided *Thompson)* held, in 1966 in

Carlson v. *New York Life Insurance Company*, 76 Ill. App. 2d 187, 222 N.E. 2d 363, that an insurance policy is to be construed in the light of the *reasonable expectations* of the insured. The Court said at 222 N.E. 2d 368:

> We might indulge in extended rationalization to justify our interpretation of the insurance contract, but we prefer simply to state that the purpose of the insurance contract would be gravely thwarted if the clause with which we are concerned were read to exclude coverage ***. The policy must be construed in the light of the reasonable expectation and purpose of the ordinary man when making an ordinary contract. In the words of Dean Roscoe Pound, "The law enforces reasonable expectations arising out of conduct, relations and situations."

4. *Thompson* does not represent the current position of the Courts of Illinois in regard to the enforcement of exclusionary language contained in contracts of insurance.

5. Additionally, the Court of Appeals in *Thompson* was not asked to construe the insuring clause in its entirety, nor the substitute trip provision at all, but decided only the application of the requirement that passage be on a "scheduled airline."

6. That portion of respondent's brief which asserts that Illinois does not look to the "reasonable expectations" of the insured in interpreting insurance contracts and that *Thompson* is the controlling Illinois law is false and should be stricken.

Respectfully submitted,

JOHN J. KENNELLY
Attorney for Petitioners

Of Counsel:
WILLIAM A. MOORMAN

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Petitioners respectfully submit that the brief of respondent, The Fidelity and Casualty Company of New York, be stricken.

I.

That portion of respondent's brief which asserts that the provisions of the Continental Casualty Company policy

were "materially different" from the provisions of The Fidelity and Casualty Company of New York's policy is false.

The premium for each policy was the same; the application for each policy was the same; the beneficiaries were the same; the insuring clause of both policies was the same, insofar as this case is concerned. However, respondent asserts that its insuring clause was "materially different" from the insuring clause in the Continental policy, which paid the full amount under its insurance policy. The Fidelity and Casualty Company of New York asserts that it has no similar obligation to pay.

The two insuring clauses are not "materially different." The *fact* is that the two insuring clauses contain *identical* provisions.

Fidelity and Casualty Company of New York Policy (Refused to Pay)

The Company will pay the benefits specified below if during the term of this policy the Insured suffers loss resulting directly and independently of all other causes from accidental bodily injury (hereinafter referred to as "such injury"), sustained under circumstances specified below during the first one-way or round trip taken by the Insured after the purchase of this policy on Aircraft Operated by a Certificated Scheduled Air Carrier as defined below from the Point of Departure to the Destination, both shown above, and return if round trip ticket is obtained before departure, *provided that at the time that the Insured sustains such injury he is traveling on a transportation ticket or pass covering the whole of said airline trip*, issued to him for transportation on an aircraft operated by a certificated scheduled air carrier.

Continental Casualty Company Policy (Agreed to Pay)

"Injury" wherever used herein means bodily injury caused by an accident resulting directly and independently of all other causes in loss covered by this policy and occurring during the first flight taken by the Insured from the Point of Departure to the Destination and the return flight from the Destination to the Point of Departure, on or after the date of Policy Purchase; *provided a ticket for each such flight has been obtained prior to the initial flight from the Point of Departure* and further provided that such injury is sustained in consequence of riding as a passenger, and not as a pilot or crew member, on a scheduled airline flight.

Contrary to The Fidelity and Casualty Company of New York's conclusion that on the basis of the above language

its policy provided *more limited* coverage than the policy of Continental Casualty Company, a reading of the two insuring clauses clearly indicates that The Fidelity and Casualty Company of New York's policy imposed no limitations beyond those contained in the policy of Continental Casualty Company — a company which paid in full.

Respondent has had 9 years in which to study the provisions of its policy and those of the policy of Continental Casualty Company. After 9 years of study, respondent has clearly been unable to determine just what its own insurance policy provides. How, then, can respondent assert that Mrs. Fakhri and her beneficiaries are bound by the terms of this insurance policy, when Mrs. Fakhri had but a few minutes to consider her policy? If the provisions of an insurance policy are unclear in their meaning to the insurer, how can they be less ambiguous to the insured?

The fundamental law of construction of insurance contracts is that all uncertainty should be resolved in favor of the insured. *Erickson* v. *Hospital Service Corp.*, 52 Ill. App. 2d 464, 202 N.E. 2d 147 (1964). An insurance policy should be construed most strongly in favor of the insured to the end that he will not be deprived of the benefit of insurance. *Howard* v. *Aetna Life Ins. Co.*, 329 Ill. App. 248, 67 N.E. 2d 878 (1946). If an insurance policy can be given any reasonable construction preventing defeat of insured's indemnification for loss covered by its general language, such construction will be adopted. *Hill* v. *Standard Mutual Casualty Co.*, 110 F.2d 1001 (7 Cir. 1940).

In *Sheffer* v. *Suburban Casualty Company*, 18 Ill. App. 2d 43, 151 N.E. 2d 429, at 430 (1958), the Court stated:

> It is a basic rule in the construction of language in insurance policies that it should be construed liberally in favor of the insured. Judge Otto Kerner in an

opinion in the Circuit Court of Appeals, 7th Cir. in interpreting Illinois law, discussed this principle in the case of *Hoffman* v. *Illinois Nat. Casualty Co.*, 139 F.2d 564, 565 as follows:

> Before discussing the provisions of the policy it is well to recall that the courts, rather uniformly and generally, have laid down the rule that insurance contracts must be construed liberally to the insured and should receive an interpretation consistent with the apparent object and plain intent of the parties . . .

This is not just another civil case involving just another insurance policy.

This case involves a form of policy issued to hundreds of millions of travelers. Purchasers do *not* get copies of these policies. The exclusionary provisions are camouflaged and consist of unpunctuated sentences of over 200 words. Is this Court going to permit the United States Court of Appeals to render a precedent which binds children and other beneficiaries of both international and domestic air travelers from recoveries upon policies, based upon such hidden, unconscionable provisions — when this Court knows from its own experience and common sense that purchasers do not receive copies of these policies and the policies are mailed immediately to the beneficiaries — and when this Court knows that the insurance premiums are the same regardless of the number of trips involved provided they occur within the time limit of the policy? In other words, here is a case where five minor children are deprived of the recovery of insurance which their mother bought for them, even though another company, with the identical policy, paid, and the respondent company did not.

The reason we make these assertions is in order that this Court will realize the significance of the respondent's

blatantly false statement that the exclusionary clauses were "materially different" — when in fact they were identical insofar as this case is concerned.

II.

Respondent asserts further, and falsely, in its brief that petitioners are urging this Court to adopt a position held only by the Courts of California, rather than the law of Illinois. Respondent in support of this assertion relies on the case *Thompson* v. *Fidelity & Casualty Company of New York*, 16 Ill. App. 2d 159, 148 N.E. 2d 9, cert. den. 358 U.S. 837 (1958), which it says represents the current law of Illinois. This statement is also erroneous.

In 1966 the Appellate Court of Illinois, Second District (the same District which decided *Thompson*), held that an insurance policy should be interpreted to effect the *reasonable expectations* of the insured. *Carlson* v. *New York Life Insurance Company*, 76 Ill. App. 2d 187, 222 N.E. 2d 363. That action involved a claim for disability benefits under an accident policy. The insurance policy there involved provided benefits only for specified losses caused by accidental bodily injury "resulting directly and independently of all other causes *** subject to the terms and conditions of this policy."

An identical provision appeared in the policy issued to Mrs. Fakhri by The Fidelity and Casualty Company of New York and also in the policy considered by the Court in *Thompson*. The Court in *Thompson* had said, in language relied upon by respondent, that the policy before the Court was simple, legible, and unambiguous.

It should be pointed out that in *Thompson* the Court was specifically considering only whether the requirement

that travel be on a "scheduled" aircraft was binding on the insured and his beneficiaries. However, it appears from the Thompson opinion that in 1958 the Court felt that all provisions should be binding.

Significantly, 8 years later, 1966, the same Court held that the above provision should not deprive the insured of coverage:

> We might indulge in extended rationalization to justify our interpretation of the insurance contract, but we prefer simply to state that the purpose of the insurance contract would be gravely thwarted if the clause with which we are concerned were read to exclude coverage ***. The policy must be construed in the light of the reasonable expectation and purpose of the ordinary man when making an ordinary contract. In the words of Dean Roscoe Pound, "The law enforces reasonable expectations arising out of conduct, relations and situations." 222 N.E. 2d 368.

It is clear that Illinois will no longer deprive beneficiaries and insureds of anticipated coverage solely because of the existence of hypertechnical exclusionary words contained in insurance policies. *Carlson* is indicative of a trend reflected in the decisions of Courts across the country. *This* decision represents the current law of Illinois.

Petitioners respectfully move this Court to strike the entire brief filed by respondent, The Fidelity and Casualty Company of New York, for the foregoing reasons, or in the alternative, that portion of its brief, quoted in the motion, which is false.

Respectfully submitted,

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